IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Daya Shanker V/S Mst.Basanti Bai

S.B.CIVIL SECOND APPEAL No. 47 of 1988

Date of Judgment : 09.10.2006

PRESENT
HON'BLE SHRI N.P.GUPTA,J.

Mr. D.R.Bhandari, for the appellant.
Mr. Tarun Joshi, for the respondents.

BY THE COURT:

This appeal has been filed by the defendant against the judgment and decree of the learned Additional District Judge, Udaipur dated 5.2.88, reversing the judgment and decree passed by learned Munsiff (South), Udaipur dated 18.1.84, and thereby decreeing the suit of the plaintiff for injunction, and directing the appellant to remove the stone slab, put by the defendant closing the window, and to keep open land to the extent of 2 ft. The defendant was also directed to remove the tin shed erected, adjoining the plaintiff's wall, and leave 2 ft wide lane through and through. It was also directed that in this 2 ft wide lane defendant will not raise any construction, and the plaintiff will be entitled to discharge water from the

spouts, and shall be entitled to open windows in this lane.

The facts of the case are, that on 15.2.77, the plaintiff respondent filed a suit for perpetual injunction, alleging to have purchased the property described in para-1 of the plaint on 15.10.76, towards the north whereof is the Bara of the appellant. It was alleged that in the northern wall there are two windows over looking the Bara, one being in the ground floor, and other being in the first floor. It was alleged that the ground floor window is more than 100 years old, ground floor was having Khaprel Kelu roof, water whereof was being discharged in the north, which had been removed some 25 years ago, and a room was constructed upstairs, wherein a window was kept, and that there is no other source of light and air in this room. Then in para-4 it was pleaded, that the plaintiff and her predecessor had been enjoying the right of light and air from these two windows, continuously, as of right, without obstruction, and they have perfected the right. It is then alleged, that the ground floor room was earlier let out by her predecessor for a cycle godown, at that time, the defendant removed the window frame and closed the window by putting the stone, some 3 years ago, thereby the light and air of the room has been deprived. Then it is alleged that the defendant has erected a tin shed, adjacent to her northern wall, on account of which, the light and air from the first floor window has also been closed. The plaintiff has then

also alleged, that earlier the two properties belonged to the same person, Fatehlal, who sold the plaintiff's property to plaintiff's predecessor on 13.8.43, at which time the defendant's Bara was with the seller, and it was clearly mentioned in the sale deed of 1943, that 2 ft wide lane would be left for discharge of water of the ground floor roof, and thus, the defendant is not entitled, to either to close the window, or to cover the land upto adjoining the plaintiff's wall. It was then claimed in para-8, that the defendant is not entitled to close the "Kadimana" window. With these averments, a decree for perpetual injunction was prayed, for opening the window, and leaving 2 ft wide lane, to remove the tin shed to the extent of 2 ft, and to restrain the defendant by perpetual injunction, not to raise any such construction in future, and to leave 2 ft wide lane.

The defendant contested the suit. It was pleaded that there is no window in the ground floor, and there is window only on the first floor. It was denied that the window is 100 years old, and the discharge of water towards the Bara was denied. It was pleaded that the stone was not placed by the defendant, but is there for the last 30 years. Regarding tin shed also, it was pleaded that the defendant had erected it 20 years ago. Then regarding the stipulations in the sale deed of Fatehlal, it was pleaded that the defendant is not bound by them, as they adversely

affect his rights, and are contrary to the provisions of Transfer of Property Act. Inter-alia with these pleadings, it was prayed that the suit be dismissed.

The learned trial Court framed some 6 issues. Issue No.1 related to existence of the windows. Then issue No.2 was relating to the discharge of roof water in the Bara. Then issue No.3 related to the plaintiff having acquired prescriptive right of easement of light and air, and discharge of rain water in the Bara, by using it for the last 20 years, continuously, peaceably, and as of right. Then issue No.4 was about defendant having closed the windows, while issue No.5 was about the plaintiff's entitlement to have 2 ft wide land opened, in view of the stipulations contained in the sale deed by Fatehlal.

Learned trial Court vide judgment dated 18.1.84 decided issue No.1 by holding, that window exists in the first floor, and in the ground floor window was there, but is closed. Then deciding issue No.2, it was held, that there is no evidence on the side of the plaintiff about the discharge of water towards the Bara, and that in the sale deed executed by Fatehlal in favour of Dhapu Bai, it is clearly mentioned, that if any first floor is constructed, then the purchaser will not be entitled to discharge the water towards the Bara. Thus the issue was decided against the plaintiff. Then deciding issues No.3, 4 and 5 together,

it was held, that the plaintiff's evidence is silent about user of the windows for the last 20 years, while the defendant clearly deposes the window to be seen closed since long, while P.W.2 has deposed the window of the ground floor to be closed for the last 25 years. Then after referring to the sale deed of 1943, it was held, that ground floor window can be said to exist for last more than 20 years, but then, it is not established that the plaintiff's water has been discharged in the north, but then since in the plaint, the plaintiff herself has alleged the window to have been closed some 3 years ago, while the defendant claims it to have been closed much earlier, apart from the fact, that P.W.1 has deposed the window to have been closed some 6-7 years ago, while P.W.3 has deposed the window to have been closed some 8-10 years ago, it was found, that only ground floor window existed. Then examining the right of the plaintiff to have re-opened, recitals in the sale deed by Fatehlal, and its binding nature was considered, and ultimately it was found, that since the window has been closed some 3 years ago, at that time, the plaintiff and her predecessor did not object to it, within the meaning of Section 38, it will be deemed, that the right had been given up. Thus, the issues were decided against the plaintiff. Consequently, the issue No.6 was also decided against the plaintiff, and the suit was dismissed.

The learned Appellate Court did not decide the matter issue-wise, and proceeded to recapitulate the evidence of the parties, and then concluded, that the window existed in ground floor, which has been closed, and there is no other source of light and air. Likewise, the spouts of the first floor also discharged water in the Bara, and the defendant has not produced the documents of purchase of land by him, for which adverse inference was drawn. Then it was concluded, that since the sale deed by Fatehlal was registered, everyone including the defendant shall be deemed to have notice thereof, and is bound by the stipulations thereof. Inter-alia with these findings, it was found, that the plaintiff is entitled to have the window opened, and to have 2 ft wide lane kept open. It was also found, that the trial Court was in error in treating the suit to be a suit on the basis of easement, and not under Specific Relief Act. In the result, the appeal was allowed, and the suit has been decreed, as above.

This appeal was admitted on 5.9.88, by framing the following substantial question of law :-

> "Whether in the facts and circumstances of this case the agreement made by Fateh Lal of sale deed (Ex.1) dated 13th August, 1943 shall be deemed to be a sufficient notice in terms of Section:3 explanation:1 of T.P. Act. If not what is the effect?"

Arguing the appeal, it was contended by learned counsel for the appellant, that though one substantial question was framed, but then the appeal does involve more substantial questions of law, viz. that, since the plaintiff, admittedly did not continue to enjoy the alleged right of easement, within two years, next before filing of the suit, whether he is entitled to the injunction prayed for ? And submitted, that on the face of the provisions of Section 100(5) C.P.C., this Court should consider and frame this question, and decide.

Arguing the appeal, it was submitted that a look at the plaint shows, that the suit was clearly based on prescriptive right of easement, and since the easement is not alleged to have been enjoyed upto two years, next before filing of the suit, the suit could not be decreed. I was taken through the entire material on record. Then arguing the substantial question as framed, it was submitted, that a reading of the explanation appended to Section 3 of the Transfer of Property Act shows, that notice contemplated thereby is a notice to the prospective purchaser only and not to the appellant.

On the other hand, learned counsel for the respondent supported the impugned judgment and decree by relying upon the sale deed dated 13.8.43 by Fatehlal, and contended, that in view of the provisions of explanation to

Section 3, the appellant also shall be deemed to have notice of the interest in the property, which he had purchased, and therefore, he is very much bound by the stipulations contained therein. Then regarding the right of easement, it was contended, that it was a case of easement by grant, under the sale deed dated 13.8.43, as earlier both the properties belonged to one person, and while selling part of the property, a right of easement was granted over the other part of the property, by the seller, that easement survives, and could not be said to have extinguished, simply by non-user of two years, and therefore, the suit has rightly been decreed by the learned lower Appellate Court.

I have considered the submissions.

Straightway, coming to the substantial question as framed, I may quote the provision of explanation, appended to Section 3(1) of the Transfer of Property Act, which reads as under:

> "Explanation I.-Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Registration Act, 1908 (XVI of 1908) from the earliest date on which any memorandum of such registered instrument has

> been filed by any Sub-Registrar with whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:”

A look at the above explanation shows, that it clearly enacts a fiction, of notice about the transaction having been effected, with respect to immovable property by registered document, where such transaction is required to be effected by registered document, and the notice contemplated is, the notice of such instrument, and as from the date of registration. True it is, that the words used are “any person acquiring such property” but then the words further go on “or any part of, or share or interest in, such property”. Thus, in my view, the notice contemplated by this provision is a notice to all, contemplating to acquire the property, or any part of, or share, or interest, therein. Therefore, the question is required to be, and is, answered against the appellant.

However, in my view, the other question, suggested by learned counsel for the appellant, does very much arise from the material already there on record, and is required to be framed, and decided, for doing complete justice between the parties.

Considering this question, a look at the plaint, contents whereof have been recapitulated in the opening

part of the judgment, shows that the whole thrust of the suit is, for enforcement of the right of easement, acquired by prescription, by continuous unobstructed peacefully user as of right, for last more than 100 years, or for more than 20 years, and the plaintiff having perfected the right by prescription, as pleaded in para-3 and 4 of the plaint. Of course in para-7, reliance has also been placed on the sale deed dated 13.8.43, but then, I may gainfully quote para-7 of the plaint, which reads as under:

> "यह कि वादीया की खरीद शुदा जायदाद व प्रतिवादी का बाड़ा किसी वक्त एक ही व्यक्ति महेता फतेलाल जी का था जब मेहता फतेलाल जी ने अपनी जायदाद वादीया के पुर्वाअधिकारी को 13-8-43 में बैह की उस वक्त प्रतिवादी वाला बाड़ा उन्हे कहे जेथा तो उन्हो वादीया की जायदाद वाले बैहनामें में साफ लिख दिया की पहली मंजिल की खिड़की व नेवो नालों के पानी के लिए 2 फीट की गलि छोड़ी जावेगा वादीया के पूर्व अधिकारी के कई वर्षों बाद प्रतिवादी ने अपना बाड़ा खरीदा है। इसलिऐ प्रतिवादी को भी महेता फतेहलाल जी के बैहनामें जो वादीया के पूर्वाअधिकारी के हक में लिखाया गया उसकी तामील करना है वो न तो खिड़की बन्द कर सकता है। न गली छोडे बिना दिवाल से भीडमा छवाई कर सकता है।"

Thus, even reading of this para clearly shows, that the 2 ft wide lane was stipulated to be kept open, only for the purpose of the ground floor window, and discharge of water from the roof of the ground floor.

A look at the sale deed dated 13.8.43 shows, that it has clearly been stipulated in para-6 of the sale deed

itself, that in case the purchaser raised further construction upstairs, the purchaser will not be entitled to keep any spout or any other easement towards the Bara, in any of the stories, however the window in the ground floor shall continue. Thus, it is clear that according to this sale deed, the plaintiff is not entitled to keep any apertures towards the Bara in the upper stories.

Even according to the plaintiff, the first floor has been constructed much later, and a window and spout has been kept towards his Bara, which is clearly prohibited by the sale deed dated 13.8.43, and precisely therefore, the plaintiff has claimed the right, qua them, as a prescriptive right of easement. Likewise, from a look at the sale deed dated 13.8.43 it is also clear, that the lane was not stipulated to be kept open for discharge of rain water of the plaintiff or the purchaser. Then a look at the sale deed dated 15.10.76 executed by Dhapu Bai in favour of the plaintiff, which also has been marked as Ex.1, does show, that therein there is no mention about any of the apertures to be existing, much less the seller transferring any right of easement therein, to the plaintiff.

Thus, it is more than clear, that the suit for injunction is based, on the plaintiff having acquired, or perfected, the rights of easement by prescription.

That being the position, on the face of the language of Section 15, the easement concerned should have been exercised for a continuous period of 20 years, in the manner provided therein, and that period of 20 years should end, within two years next before filing of the suit. In the present case, admittedly, as alleged in para-5 of the plaint, that the window on the ground floor has already been closed 3 years ago, and it has also come in the statement of P.W.1, that even the window of first floor has also been closed, more than 3 years before filing of the suit. In that view of the matter, in my view, irrespective of the plaintiff having used the windows for light and air for 20 years, or more, but then in view of their having admittedly been closed, more than two years before filing of the suit, the plaintiff is not entitled to any injunction in that regard whatever.

Thus, the second question, as framed, is answered in favour of the appellant, and against the respondent.

The net result is, that the appeal is allowed, the impugned judgment and decree is set aside, and the plaintiff's suit is dismissed.

The parties are directed to bear their own costs throughout.

(N.P.GUPTA),J.

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